Chapter 1

# REFLECTIONS

Counting our blessings is a useful exercise. Today, Federal administrative law judges enjoy an occupational position that the United States Supreme Court has described as "functionally comparable" to that of, in effect, U.S. District Judges. ***Butz v. Economou,*** 438 U.S. 478, 513 (1978). That material differences exist between the two positions does not lessen the esteem that NLRB judges have gained since Congress created the Agency in 1935.

Such esteemed positions did not suddenly appear one day fully robed. If asked to name some of the advancements that have been made over the last 69 years, NLRB judges (to focus on our own Agency) could include the following events among the improvements for their positions:

1. 1938 — By change in its policy, effective August 1, 1938, the Board switches the Trial Examiners Division from a mostly per diem staff to a roster of solely regular-staff judges. Of all the improvements in the lot of NLRB judges, this early change (probably the least known of those on this list) arguably is the most important. It is discussed in the Introduction that follows.

2. 1946 and 1947 — Decisional independence. (Mandated by the Administrative Procedure Act, and reinforced the following year in Section 4 of the National Labor Relations Act, as amended by the Taft-Hartley Act.) For any who may take this blessing for granted, the following lines from Senate Report No. 105 should infuse some appreciation for the statutory prohibition:

> Under current practice, before a trial examiner issues his report to the parties, its contents are reviewed and frequently changed or influenced by the supervisory employees in the Trial Examining Division. Yet, since the report is signed only by the trial examiner, the Board holds him out as the sole person who has made a judgment on the evidence developed at the hearing. * * * Consequently, the committee bill prohibits any of the staff from influencing or reviewing the trial examiner's report in advance of publication, thereby obviating the need for reviewing personnel in the Trial Examining Division.

***1 Legislative History of the Labor Management Relations Act, 1947*** at 415 (NLRB, 1948).

3. 1950 — Board solidifies policy of attaching "great weight" to judges' credibility findings "insofar as they are based on demeanor." ***Standard Dry Wall Products,*** 91 NLRB 544, 545 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

4. 1951 — About January 1951, the Agency opens a Judges Branch in San Francisco, thereby reducing the tremendous travel burden on the judges. Before then, judges had to travel from Washington, D.C. to all areas of the country. A lot of travel before 1951 was still by train. Thus, as former Chief Judge George O. Pratt reported in a March 18, 1970 oral history interview, when judges left for trials and representation case hearings on the West Coast, or other areas remote from the Washington office, they might be gone from a month to "two or three months at a time." (***Pratt*** at 125-127; full cite given later at "Sources.") And as commercial air travel developed, particularly jet travel that began in the United States in January 1959 with the *Boeing 707*, the travel burden was reduced even more for all judges.

5. 1951 — ***Universal Camera Corp. v. NLRB,*** 340 U.S. 474, 27 LRRM 2373 (2-26-1951) (Intermediate Reports of Trial Examiners are part of the "record" for applying the substantial evidence test). Before this pronouncement, and prior to the Taft-Hartley amendments, Intermediate Reports of the NLRB's trial examiners appear to have been assigned no more weight by commentators or courts than these persons or tribunals would have given an "interoffice memorandum." ***NLRB v. Botany Worsted Mills,*** 133 F.2d 876, 882-883 (3d Cir. 1943) (citing "Pike and Fischer, Administrative Law"). Today, factual findings of administrative law judges, especially those turning on credibility resolutions depending on an assessment of witness demeanor, enjoy substantial deference from the several United States courts of appeal. See Hardin and Higgins, 2 ***The Developing Labor Law*** 2585-2587 (2001, 4th ed.).

6. 1972 — Title changed from "Trial Examiner" to "Administrative Law Judge" by U.S. Civil Service Commission regulation on August 19, 1972, and by Congressional statute on March 27, 1978. See Prof. Morell E. Mullins, ***Manual for Administrative Law Judges*** at 2 fn. 7 (2001 Interim Internet Edition; www.oalj.dol.gov/libapa.htm#apa). When the Board first announced this in one of its published decisions, Judge Benjamin K. Blackburn is the judge who, by the coincidence of timing, received the honor of being the first NLRB "Trial Examiner" to be recognized, by the legal change in the position title, as an Administrative Law Judge. ***Globe-Union,*** 199 NLRB 80 fn. 1 (Sept. 14, 1972).

7. 1978 — ***Butz v. Economu,*** 438 U.S. 478, 513 (1978) (declaring ALJs to be "functionally comparable" to judges).

8. 1996 — After a 1-year experiment, NLRB rules changed to permit bench decisions. 29 CFR § 102.35(a)(10).

9. 1996 — NLRB rules changed to render post-trial briefs at judge's discretion after notice at trial. 29 CFR § 102.42.

Pause for a moment. Feel a sense of the time — the late 1930s and the early 1940s. It was the last part of the Great Depression and the first years of World War II. Effective October 24, 1939, the Federal minimum wage increased by a nickel to 30 cents per hour, and that is where it remained until 6 years later (October 24, 1945) when it went to 40 cents an hour. For 1939 the President's salary was $75,000 — as it had been since 1909. (It went to $100,000 in 1949.) The Federal income tax rate on the lowest tax bracket for 1939 was (after a deduction of 10 percent of earned income), 4 percent of taxable income up to $4000. On the top bracket the rate was 79 percent for taxable income over $5 million. Frederick Lewis Allen, author of that informal history of the 1920s, ***Only Yesterday*** (1931, 1959), reminds us as follows in his sequel for the 1930s, ***Since Yesterday*** (1939, 1972), at 334:

> An uncertain climb out of the pit of the [1937-1938] Recession brought the Federal Reserve Board's adjusted index up to 102 in August, 1939. But that was only a shade higher than the point it had reached during the New Deal Honeymoon; and still there were nine and a half million people unemployed.

Less than a month after the Federal Reserve's index went to 102, distant drums sent ominous vibrations all the way to America, for on September 1, 1939, Hitler's Germany invaded Poland. Still, from that time of lost wealth and severe hardships of the Great Depression, and the sound of approaching war drums, 1939 produced some memorable achievements. With many of its 770 or so photos coming from the archives of the old ***Life*** magazine, editor Richard B. Stolley's ***Life: Our Century In Pictures*** (1999, Bullfinch Press), at 148-153, pronounces 1939 "The Greatest Year in Hollywood — Ever." People lined up to see ***Gone With The Wind***. From another wonderful film of that year, ***The Wizard of Oz***, who can ever forget Judy Garland's singing of ***(Somewhere) Over The Rainbow***? Author John Steinbeck wrote ***The Grapes of Wrath*** (and it became a 1940 motion picture of the same name). Union songs were popular with workers, and the 1938 song ***Joe Hill*** was a big hit. Two years later, in 1940, Woody Guthrie wrote ***Union Maid***, a favorite to this day for many.

Referencing the "Grapes of Wrath" should remind us all of some of the hardships that Americans endured during that time. In the 1930s, and particularly the years of 1935 to 1938, a great drought afflicted the Great Plains

States. When the NLRB was opening for business in 1935, farm families in several States decided to escape from the drought and dust storms. Many traveled in caravans to California. Perhaps some who are reading this paper heard first-hand accounts from their kinfolk who lived through those terrible days.

A recent, but brief, article in ***Texas Highways*** describes one day in 1935 when the sky over west Texas turned black. I copy that article here:

## Black Sunday by Nola McKey

> Although dust storms were common across the southern Great Plains in the 1930s, the spring storms between 1935 and 1938 proved especially violent. One of the most notorious "black blizzards" occurred on Palm Sunday, April 14, 1935. Originating in South Dakota and pushing southward, it affected portions of five states, including the Texas Panhandle. It hit with such intensity and suddenness that many people believed the end of the world had come. The phenomenon inspired Woody Guthrie, who lived in Pampa at the time, to compose the song **"The Great Dust Storm,"** which described the approaching cloud as "deathlike black" and "the worst dust storm that ever filled the sky."
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> Pampa native Frank Stallings Jr., author of ***Black Sunday: The Great Dust Storm of April 14, 1935*** (Eakin Press, 2001), writes that the storm began rolling across the region in midafternoon, "instantaneously turning sunshine into midnight." Thousands of Sunday drivers and picnickers, enjoying a clear, sunny day, were suddenly engulfed in darkness. The air became so thick with dust that "you couldn't see your hand in front of your face." Car lights could barely penetrate the "absolute blackness." People had trouble finding their way from the front yard to the front door, and parents feared their children would suffocate.
>
> In most parts of the Plains, the worst of the storm lasted only a few hours and, amazingly, caused no direct fatalities. But the frightening event left an indelible mark on the memories of those who experienced it. The storm left another legacy: While covering the phenomenon, Associated Press reporter Frank Geiger coined the phrase "dust bowl," which would give the Thirties era its name.

**"Black Sunday,"** by Nola McKey, associate editor,

51 ***Texas Highways*** No. 4 at 9 (April 2004).

A picture taken of that black cloud accompanies the article, and can be viewed by clicking on (Ctrl+mouse click) the following link to the Texas Highways magazine: http://www.texashighways.com/currentissue/speakingoftexas.php?id=197 . At the left side of that page, in the first Search box, type "black Sunday" and click "Go" to bring up the next screen. Once there, click on the article "Black Sunday" to view the photo.

Indeed, three other Dust Bowl photos appear in **LIFE, *Our Century in Pictures*** at 125 (1999).

Across the Eastern Sea in June 1940, France fell. That same month, the Division sustained a budget hit and (as mentioned again later) had to lay off over 28 percent of its judges. As authors Williamson Murray and Allan R. Millett report in their book on World War II, ***A War To Be Won*** at 82:

> Savoring the humiliation, Hitler had German engineers drag out the rail car in which the delegates of the German republic had capitulated in November 1918. It was now the site of a second humbling, this time of the French.

A month later, in July 1940, the Battle of Britain began. ***A War To Be Won*** at 87.

From a 1941 film came the very popular song, ***The Last Time I Saw Paris***, with ***White Christmas*** taking the top honor in 1942. (Two others popular in 1942 were ***Don't Sit Under The Apple Tree*** and ***Praise The Lord and Pass the Ammunition***.) As discussed in more detail below in chapter 4 ("Staffing numbers"), in May 1942 the Division held a Trial Examiners Conference in Annapolis, Maryland. A month later, in June 1942, survivors of the Bataan Death March began transferring to their last P.O.W. camp — Cabanatuan — situated some 60 miles north of Manila. In his 2001 book describing the Death March and the January 1945 rescue, by U.S. Army Rangers, of the relatively few remaining survivors of Cabanatuan, author Hampton Sides describes Cabanatuan as a camp where the POWs were "exterminated ... through a kind of malign neglect." ***Ghost Soldiers*** at 134. The year 1943 began with a January meeting between F.D.R. and Churchill at Casablanca. ***A War To Be Won*** at 218, 299. For 1943, ***Casablanca*** won the Oscar for best motion picture, and on the Hit Parade one of the top favorites was, fittingly, — ***As Time Goes By***.

Americans of that generation were tough, and they were survivors. That first generation of NLRB judges had to be the same. Aside from per diem pay for many at the start of their careers (including future Chief Judges William Ringer and George Bokat), plus conduct approaching some decisional oversight (see the above-quoted legislative history of the Taft-Hartley Act), some were even called before a Congressional committee to testify about their conduct in

various cases. As to the latter, see the description by Professor James A. Gross in his second book (of three) on the Agency, ***The Reshaping of the National Labor Relations Board*** 183-186, 337-338 (1981). Professor Gross reports that seven Trial Examiners actually testified. ***Reshaping*** at 183 and 337, fn. 55. Judge Bokat was one of the seven. ***Bokat*** at 37, 43-44, 80. How lucky we are to have arrived for work much later, in the shade of the late afternoon, after others have borne the heat and hardships of the day. And, as in the Biblical parable, we have been paid a full share, notwithstanding our late arrival.

Indeed, return briefly to the 1945 Trial Examiner's Manual mentioned a few moments ago at the Acknowledgements page. Modern judges have rarely, if ever, been required to preside on Saturdays. Yet in the early years Division policy for ULP trials was (after a 10 a.m. start on the first day) hours of 9:30 a.m. to 5 p.m., lunch of 1-1/2 hours, and half a day on Saturdays of 9:30 a.m. to 1 p.m., generally with no night sessions except under "unusual circumstances" or by agreement of the parties, for a total of "at least 33 hours per week." ***Trial Examiner's Manual*** at 16 (1945). And if they were back in Washington, D.C., by Friday night, they were expected to attend a staff meeting beginning at 10 a.m. Saturday morning. ***Id.*** at 105.

Modern judges would be quick to point out that their daily hours generally are longer, averaging at least 7 working hours or more per day, for a weekly total of at least 35 hours (for full-week trials), and therefore no need to preside or meet on Saturdays. And for many years, judges frequently have presided until 6 p.m. and later in order to complete the testimony of a witness or to finish a trial. Of course, the point is that for judges in the early years, workweeks could well include either a half day of trial on Saturday or a staff meeting on Saturday morning. Moreover, although the 1945 manual does not mention this, in light of Saturday morning trials, and the fact that a lot of travel in the 1930s and 1940s was by train, the blunt reality is that for many years, as "old timers" have reported (such as former Chief Judge Pratt described in 1970), when trials and hearings were not close to Washington, D.C., there was no option of flying home late on Friday and flying back to the trial site late on Sunday.

As we see shortly, when the per diem system of payment is summarized, many judges received a portion for salary, plus so much for expenses, plus their **"railroad fare"** (emphasis added) to and from Washington. ***Pratt*** at 121. Certainly in the late 1930s travel by train was the norm, even though *DC-3s* had been introduced in June 1936. www.crsmithmuseum.com. (Click on American Airlines history, and then the tab for the 1930s.) Perhaps the judges, after arriving at some kind of train or air hub, then took a bus to reach some remote areas. The rental car industry had been in operation in Chicago for a good many years, and in 1932 Hertz opened the first rental car agency for Chicago's Midway airport. See the Hertz

website, www.hertz.com, and click on "About Hertz" and "Hertz History." Of course, rental car availability at Chicago would not be much help for a case off the beaten trail in Oregon, Michigan, or Texas. And during the years of World War 2, travel by plane was not easy because of wartime restrictions and the lack of planes available for commercial flights. For example, the PBS history article, "Chasing The Sun," reports, when summarizing American Airlines' history, "With the onset of WWII, the nation's commercial fleet was pressed into military service." www.pbs.org/kcet/chasingthesun. That was not a total draft. For example, just under one half of American Airlines' fleet of *DC-3s* was drafted for military service. www.crsmithmuseum.org. (Once there, click on American Airlines history, and then on the tab for the 1940s.)

The reality seems to be this: during the 1930s, most of the 1940s, and perhaps even until the airlines had switched to the jets, absent an adjournment with a resumption date set off in the future, it was not unusual for the judges to spend at least 1 weekend away from home during a trial. Indeed, this would have lasted for as long as Saturdays were official workdays, jets or no jets. For example, in ***Wilson & Co.,*** 7 NLRB 986, 987 (1938), Judge Patrick H. McNally presided for 8 days in a trial that opened in Albert Lea, Minnesota (about 100 miles south of Minneapolis) on July 19, 1937, and closed 8 days later on July 27. One of those 9 days, July 25, was not a trial date. Per a 1937 calendar, that July 25 was a Sunday. As Albert Lea would not have been a short train ride home for Saturday night, it is clear that Judge McNally had to spend that weekend at Albert Lea. Even if Albert Lea has some beautiful churches for Sunday worship, the point is that the judge, as all the other judges from time to time, could not choose to be home that weekend.

And as former Chief Judge Pratt describes in his March 1970 oral history interview, the time away from home could stretch for several weeks, even as much as 2 to 3 months if the judges had to cover a bunch of cases on a big sweep out west (before the San Francisco office opened). ***Pratt*** at 125-127. For another trial that surely meant a lot of weekends away from home, see ***Ford Motor Co.,*** 23 NLRB 342 (1940). Judge Tilford E. Dudley opened that trial in St. Louis on December 16, 1937, and closed it on April 9,1938. The Board writes, at page 346, that the trial lasted for 90 days, with the Respondent itself calling over 500 witnesses. Clearly, aside from a probable break over Christmas through, perhaps, New Year's Day, Judge Dudley spent most of his weekends in St. Louis.

Another judge from that time, A. Bruce Hunt (EOD 3-18-1939, after service in the old Review section), confirms, in his March 17, 1969 oral history interview, that travel during that time could mean being "away from home for seven or eight or nine weeks." (***Hunt*** at 1-2, 6) And Will Maslow, who left his trial attorney position in Region 2 (New York) to become a trial examiner in October 1941, recalls, in his March 20, 1970 oral history interview, that he

traveled about 20,000 miles during his first year as a judge, with all such miles being by train. (***Maslow*** at 3, 13) Even so, probably a few judges preferred train travel for any of several reasons. As Peter Winkler (Acting Chief Counsel for Board Members, currently Member Ronald E. Meisburg) reports, his father, retired Judge Ralph Winkler (EOD April 3, 1950), preferred travel by train and generally took the train well into the 1950s even after most other judges were flying regularly. Judge Winkler enjoyed the opportunity of a train ride while reading the latest issue of the **Saturday Evening Post**. A Board family, both Winklers met their future brides at the Board. See 9 **All Aboard** No. 6 at 9, 11 (Feb. 2003).

Mention a moment ago of the San Francisco office (that opened about January 1951) calls up the subject of travel. Even in modern times, after the San Francisco office opened, the extent of travel for the judges has been something of a problem. Before the San Francisco office opened, the travel burden at times just became too great for some. Thus, the same Judge Maslow mentioned above describes how he left the Division, and the Agency, in about May 1943, taking another Government position, because his wife could no longer stand for him to be away from home at least half the time. ***Maslow*** at 3, 27.

There were other judges who also left the Division. Although as to them this paper has no citation to give showing that the travel burden just became too much, one must conclude that for some of those who left, the travel burden in those early years (before the San Francisco office opened) was surely a factor in their decision to leave. A prime example of a judge who quite likely fits this category is James C. Paradise. (As we see much later, it was Judge Paradise who was instrumental in assisting future Chief Judge George Bokat get hired as a trial examiner in October 1937.) There is some indication that Paradise, before joining the Division, was a lawyer in the New York City area. (Judge Maslow suggests as much in the course of reporting that they were friends. ***Maslow*** at 2.) Although Paradise appears to have been a solid asset of the Division, in early 1942 (as reflected in the bound volumes of the Board's published decisions), he left the Division to become a staff attorney at Region 2, New York.

The 1945 ***Trial Examiner's Manual*** is a wonderful piece of work. Written with a thorough and professional approach, the manual addresses in detail many of the practical questions and tasks that could face a judge in the course of a day, whether in trial or at work on a decision. (Judge Pratt tells us that Assistant Chief Trial Examiners Frank Bloom and William R. Ringer wrote what appears to have developed into the 1945 manual. ***Pratt*** at 168.) There is wisdom there, borne of practical experience, that judges today would profit from studying.

[This historical note. Before Judges Pratt, Bloom, or Ringer arrived at the Division, the Board, apparently in September 1935, issued its "Instructions to Trial Examiners," a rather lengthy memorandum of, it appears, at least 22 pages. See the first of Professor James A. Gross' three books covering the Agency, ***The Making of the National Labor Relations Board*** (1974) (***Making***), at 163-165, fns. 63, 66, and 73. And, as noted in this paper a few pages later, under the topic for "Officials and Other Early-Day Judges," Secretary Wolf presided over half a dozen cases (including four unfair labor practice trials), from December 1935 (1 NLRB 316) to November 1936 (2 NLRB 385). In his oral history interview, former Secretary Wolf reports that he prepared a "Trial Examiners Manual" that he presented to the Board and which he assumes was amended thereafter from time to time based on further experience by the Division. ***Wolf*** at 33, 57-58, 74-75. Wolf may well have played a substantial role in drafting the September 1935 "Instructions to Trial Examiners." It also appears that whatever manual he later developed as a result of his presiding half a dozen times presumably was used to some extent when Judges Bloom and Ringer began drafting what evolved into the 1945 ***Trial Examiners Manual***.]

Although the 1945 ***Trial Examiners Manual*** is a graceful work, some of the restrictions present in those early years would not sit well today. Respecting a judge's decision ("intermediate report"), the extensive internal review system, including the assistance of a critical, by design, analysis by an "associate attorney," might send chills through most modern judges. Indeed, some of the older judges did not like it when the procedure came about back in 1940. (See 5 ***NLRB Annual Report*** 123; ***Pratt*** at 132-133, saying that the attorneys were from the Review section on assignments of about 6 months.) For example, consider the following:

> In reading the record, the Associate Attorney should note carefully anything therein that might be error; such matters should immediately be called to the attention of the Chief Trial Examiner or Assistant Chief Trial Examiners. Likewise, any minor improprieties in the conduct of the hearing, extreme laxity of the Trial Examiner in the handling of witnesses, exhibits, or counsel for the parties should be noted for discussion with the Trial Examiner or the Chief Trial Examiner.

***Trial Examiner's Manual*** at 107(1945).

Granted, the goal of this was not to punish a judge, but to enable the Chief Judge to see whether he needed to reopen a hearing, and to the end that "clear, well-written Intermediate Reports be issued." Id. at 107-108. Regardless of those practical goals, probably all judges today would take pride in declaring, "That's my job." The function of the associate attorneys is briefly

described in three annual reports of the Board: 5 ***NLRB Annual Report*** 123 (FY ending June 30, 1940); 6 ***NLRB AR*** 7 and 9; and 7 ***NLRB AR*** 12.

During some of those Wagner Act years, the judges appeared before the Board to present, defend, or explain their decisions. Thus, from the 1945 ***Trial Examiner's Manual*** at 110 (1945):

> The Board has adopted the policy of conferring with the Trial Examiner, Associate Attorney and Review Attorney during the decision-making process. At this conference the Board considers the record and particularly the Intermediate Report, the exceptions filed thereto, briefs and suggestions and opinions of the Trial Examiner, Associate Attorney and Review Attorney, and various supervisors who may be familiar with the record. ... It is imperative that when appearing before the Board, the Associate Attorney, as well as the Trial Examiner, have all the facts necessary for an intelligent presentation.

As Chief Judge Bokat describes in his March 1969 oral history interview (full citation given later in the Sources section), some of the judges did not sit silently at such conferences. He reports that Judge Charles Persons was one who would argue vociferously with, particularly, Member Leiserson. ***Bokat*** at 48. Judge Bokat tells us that there would be Judge Persons, who was not a lawyer (and neither was Member Leiserson), debating legal issues with Leiserson in the presence of several who were lawyers. ***Bokat*** at 48.

A couple of examples of the tone of living as a judge then can be felt in the following brief instructions for judges when they were in travel status. Have to rush to catch the next train home? Better read page 34, repeated at page 84:

> Unless definite arrangements have been made with the Chief Trial Examiner, The Trial Examiner will not leave the place of the hearing without further instructions.

***Trial Examiner's Manual*** at 34, 84 (1945).

Change of hotels? Permission apparently needed. (Page 102.) While the goal of full information should there be need is perhaps understandable, one has to wonder whether the judges then actually called the hotel desk if they changed their choice of restaurants after departing for dinner. Thus, at page 102:

> When [a trial examiner is] in the field, the division must be able to reach a Trial Examiner at any time. The Trial Examiner will therefore not leave his hotel or other lodging without leaving word as to his whereabouts and when he will return.

However, Judge Pratt gives us another perspective on the matter of being able to reach the judges. When those judges were out in remote areas for days, even weeks, at a time, it was a morale booster for them to get a call from Judge Pratt who brought them up to date on the relevant news events about the Board and labor related matters. ***Pratt*** 125-127.

Turn now to consider the progress that has been made. Although modern times bring current needs to be addressed, for the last many years NLRB judges have enjoyed a comfortable view from the bench. Regular paychecks, benefits, and pensions. Decisional independence. Lawyers preface their motions and arguments with, "Your Honor." Even the U.S. Supreme Court has bestowed its blessing. As judges at any nearby courthouse, NLRB judges can render bench decisions and, in other cases, dispense with posttrial briefs at their discretion. As former Chief Judges George Pratt, William Ringer, and George Bokat might tell us, "Count your blessings, for it was not always so."

Before leaving our reflections on those early years, how can we best remember them and the judges? At what lyrics would those early-day judges nod in approval if we lifted a glass to their memory? The opening lines from Gene Raskin's 1968 song, ***Those Were The Days***, might be fitting:

> Once upon a time there was a tavern,
> Where we used to raise a glass or two.
> Remember how we laughed away the hours,
> And dreamed of all the great things we would do.

(As Liam Clancy suggests, in his insert to the 1995 CD album of the Clancy Brothers and Robbie O'Connell, ***Older But No Wiser,*** the "tavern" is a reference to the back room of the White House Tavern in New York's Greenwich Village where the Clancys and other singers and songwriters, such as Bob Dylan and Gene Raskin, "all hung out" during, apparently, the early 1960s. Of course, the album's title quotes part of a passage from Raskin's fourth verse.)

Was that time of the early judges "Just a passing breeze — Filled with memories — " (1962, ***Days Of Wine And Roses***)? Filled with memories, yes. From the very month that the Wagner Act became law, these lines from General MacArthur's July 14, 1935 address (**Let Us Remember**) to the veterans of the 42nd "Rainbow" Infantry Division," provide haunting imagery that is relevant here:

> It was seventeen years ago — those days of old have vanished, tone and tint; they have gone glimmering through the dreams of things that were. Their memory is a land where flowers of wondrous beauty and varied colors spring, watered by tears and

> coaxed and caressed into fuller bloom by the smiles of yesterday. Refrains no longer rise and fall from that land of used-to-be. We listen vainly, but with thirsty ear, for the witching melodies of days that are gone. . . . The faint, far whisper of forgotten songs no longer floats through the air.

Douglas MacArthur, ***A Soldier Speaks*** at 67-68 (1965, Frederick A. Praeger).

Perhaps all of those images, and others, are appropriate here. Indeed, one vivid description comes from Judge Will Maslow who tells us of the camaraderie that developed among some of the judges in those early years. Thus, before they were able to move their families to Washington, several of the judges lived at the same rooming house on Connecticut Avenue. (Although Judge Maslow does not give us the names of those living in the same rooming house, the EOD dates show that Judges Frank A. Mouritsen and Samuel Edes also arrived at the Division that same October 1941, with William E. Spencer arriving in November. There possibly were others living at the rooming house who arrived either several months earlier or later.) Even after the families moved to Washington, the judges and their families visited and continued their close fellowship. ***Maslow***, 12-13.

Those early judges, as did their generation, conquered the hardships they faced. Because they did, and because of their camaraderie and continued fellowship, they probably smiled at their adversities. Indeed, in a few pages we will see them smiling at us from a group photo of the attendees at the May 1942 Trial Examiners Conference. So let us lift a glass and remember them, and the witching melodies of days that are gone, with a toast of these lyrics by Alan and Marilyn Bergman from the 1973 song, ***The Way We Were:***

> So it's the laughter
> we will remember
> whenever we remember
> the way we were;
> the way we were.

Although those early-day judges might not feel any strains of nostalgia if they were looking back upon that time, is there a different feeling for us? Might we apply a different set of lyrics for ourselves as we think of them and those early years? If so, what would they be? Perhaps they would be these lines of the theme song, ***The Hands of Time***, from the 1973 motion picture, ***Brian's Song:***

If the hands of time
were hands that I could hold,
I'd keep them warm
and in my hands
they'd not turn cold.

Before closing these reflections, it is fitting that we consider two aspects of our modern years. Earlier, I mentioned the big layoff that hit the Agency, and the Division, in Fiscal 1940. That was the Division's first, and greatest, reduction in force (RIF) — 10 of 35 judges (nearly 29 percent!). Later, in Fiscal 1952, the Division sustained another layoff, although less severe. 17 ***NLRB Annual Report*** 1 fn. 1, 5. Fortunately, we in the modern era have not been faced with the economic lacerations resulting from a layoff. (One almost developed in the 1990s when most of the Government was not funded for a time, but eventually that crisis was solved.) As is summarized later in the section on staffing numbers, when the Agency's caseload increased during the 1950s, 1960s, 1970s, and into the 1980s, so did the number of the Division's staff of judges increase. When the caseload began to slide later in the 1980s and into the 1990s, the number of the Division's judges also decreased — but unlike in the early years, this time with no layoffs.

Accordingly, let us give management its due credit. In addition to normal attrition assisting in reducing the numbers to the necessary levels, our chief judges have exercised skill and good judgment, not only in hiring or not hiring, but also in finding opportunities in the late 1980s and early 1990s for some of us to assist the Division by being loaned out to other Federal agencies in need of our services. This loan program helped the Division survive without a layoff until normal attrition reduced the staffing number to the necessary level. We have been blessed.

In yet another important area the Division and the Agency were well ahead of the curve respecting the concept of flexiplace (telecommuting) arrangements. Long before the year 2000, the Division had a judge or two who alternated between working at their office in Washington, D.C., and at their home in a nearby State. However, and with this personal note, so far as I know, the Division launched into a new era in April 1982 when it permitted me to work exclusively from my home in Houston (later, Katy), Texas (traveling to the Atlanta office every 2 or 3 years or so for a staff meeting), until I retired nearly 20 years later in November 2001.

For this early foresight, tolerance, and willingness to experiment with a full flexiplace arrangement (indefinite at first, but essentially permanent), I am forever grateful to the Division, the Agency, to the Chief Judges (Mel Welles, who telephoned me in late March 1982 and said I was free to head for Texas, Dave Davidson, and Bob Giannasi), and Associate Chiefs Hutton Brandon and

Bill Cates, who had to manage the Atlanta office and work assignments with a certain amount of managerial inconvenience associated with a flexiplace arrangement. Later, the Division expanded the flexiplace program so that several judges began working from their homes, some in States away from the State in which their Division office is located. It is my understanding that today the Division's flexiplace policy is alive and well.

What many blessings all of us have had as judges of the Division. For these many blessings, I give thanks — not only for the early day judges who labored in the heat of the day, but also to the Division's modern day managers, the Chief Judges and the Associate Chief Judges, who successfully have guided the Division through some challenging times. The NLRB is a great place to have a career, especially one as a judge with the Division of Judges.

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Katy, Texas

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